Supreme Court, U.S.
FILED
NOV 24 1992
OFFICE OF THE CLERK

No. 91-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

vs.

KEVIN TAYLOR,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

KENT S. SCHEIDEGGER
CHARLES L. HOBSON*
Criminal Justice Legal Fdn.
2131 L Street (95816)
Post Office Box 1199
Sacramento, CA 95812
Telephone: (916) 446-0345

Attorneys for Amicus Curiae Criminal Justice Legal Foundation

* Attorney of Record

QUESTION PRESENTED

Is a rule that overturns an established state practice "new" under *Teague* v. *Lane*, 489 U. S. 288 (1989)?

TABLE OF CONTENTS

Question presented i

Table of authorities v

Interest of *amicus curiae* 1

Summary of facts and case 2

Summary of argument 3

Argument 4

I

The Seventh Circuit's *Teague* analysis is incorrect 4

A. *Boyde* v. *California* 4

1. Too new 4

2. Too general 6

B. *Connecticut* v. *Johnson* 8

II

A rule overturning an established state practice is *per se* new under *Teague* 12

A. Practical benefits 13

1. Preserving convictions 13

2. Bright line rule 14

B. Comports with *Teague* 17

III

The present case demonstrates the need to further protect established state practices under *Teague* 22

IV

The established practice test should not be prevented by *Penry* v. *Lynaugh* 26

V

The rule imposed by the Seventh Circuit is new 28

Conclusion 30

TABLE OF AUTHORITIES

Cases

Addington v. Texas, 441 U. S. 418, 60 L. Ed. 2d 323, 99 S. Ct. 1804 (1979) 25

Allen v. Hardy, 478 U. S. 255, 92 L. Ed. 2d 199, 106 S. Ct. 2878 (1986) 27, 28

Batson v. Kentucky, 476 U. S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986) 27

Beck v. Alabama, 447 U. S. 625, 65 L. Ed. 2d 392, 100 S. Ct. 2382 (1980) 28, 29

Boyde v. California, 494 U. S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990) 3, 4, 5, 6, 7, 28

Brown v. Allen, 344 U. S. 443, 97 L. Ed. 469, 73 S. Ct. 397 (1953) 21

Butler v. McKellar, 494 U. S. 407, 108 L. Ed. 2d 347, 110 S. Ct. 1212 (1990) 15, 16, 18, 21, 25, 27, 29

Caldwell v. Mississippi, 472 U. S. 320, 86 L. Ed. 2d 231, 105 S. Ct. 2633 (1985) 7, 27

Chapman v. California, 386 U. S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967) 9

Connecticut v. Johnson, 460 U. S. 73, 74 L. Ed. 2d 823, 103 S. Ct. 969 (1983) 3, 4, 8, 9, 10, 11, 28

Cupp v. Naughten, 414 U. S. 141, 38 L. Ed. 2d 368, 94 S. Ct. 396 (1973) 6

Dunaway v. New York, 442 U. S. 200, 60 L. Ed. 2d 824, 99 S. Ct. 2248 (1979) 14

Eddings v. Oklahoma, 455 U. S. 104, 71 L. Ed. 2d 1, 102 S. Ct. 869 (1982) 8

Engle v. Isaac, 456 U. S. 107, 71 L. Ed. 2d 783, 102 S. Ct. 1558 (1982) 19

Escobedo v. Illinois, 378 U. S. 478, 12 L. Ed. 2d 977,
84 S. Ct. 1758 (1964) 13

Falconer v. Lane, 905 F. 2d 1129
(CA7 1990) 2, 4, 5, 22, 24, 28

Fare v. Michael C., 442 U. S. 707, 61 L. Ed. 2d 197,
99 S. Ct. 2560 (1979) 14, 15

Flowers v. Illinois Dept. of Corrections, 962 F. 2d 703
(CA7 1992) 5, 21, 25

Francis v. Franklin, 471 U. S. 307, 85 L. Ed. 2d 344,
105 S. Ct. 1965 (1985) 10

Franklin v. Lynaugh, 487 U. S. 164, 101 L. Ed. 2d 155,
108 S. Ct. 2320 (1988) 26, 27

Gardner v. Florida, 430 U. S. 349, 51 L. Ed. 2d 393,
97 S. Ct. 1197 (1977) 8

Gideon v. Wainwright, 372 U. S. 335, 9 L. Ed. 2d 799,
83 S. Ct. 792 (1963) 20

Griffith v. Kentucky, 479 U. S. 314, 93 L. Ed. 2d 649,
107 S. Ct. 708 (1987) 14, 23

In re Winship, 397 U. S. 358, 25 L. Ed. 2d 368,
90 S. Ct. 1068 (1970) 10

Johnson v. New Jersey, 384 U. S. 719, 16 L. Ed. 2d 882,
86 S. Ct. 1772 (1966) 14

Jurek v. Texas, 428 U. S. 262, 49 L. Ed. 2d 929,
96 S. Ct. 2950 (1976) 26

Linkletter v. Walker, 381 U. S. 618, 14 L. Ed. 2d 601,
85 S. Ct. 1731 (1965) 14, 28

Lockett v. Ohio, 438 U. S. 586, 57 L. Ed. 2d 973,
98 S. Ct. 2954 (1978) 8

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081,
81 S. Ct. 1684 (1961) 14

Miranda v. Arizona, 384 U. S. 436, 16 L. Ed. 2d 694,
86 S. Ct. 1602 (1966) 13

Mistretta v. United States, 488 U. S. 361,
102 L. Ed. 2d 714, 109 S. Ct. 647 (1989) 21

New York v. Belton, 453 U. S. 454, 69 L. Ed. 2d 768,
101 S. Ct. 2860 (1981) 15, 17

Patterson v. New York, 432 U. S. 197, 53 L. Ed. 2d 281,
97 S. Ct. 2319 (1977) 23

Payne v. Tennessee, 115 L. Ed. 2d 720,
111 S. Ct. 2597 (1991) 13, 19

Penry v. Lynaugh, 492 U. S. 302, 106 L. Ed. 2d 256,
109 S. Ct. 2934 (1989) 17, 26, 27

People v. Flowers, 561 N. E. 2d 674
(Ill. 1990) 2, 15, 21, 22, 23, 28

People v. Reddick, 526 N. E. 2d 141
(Ill. 1988) 2, 5, 20, 22

People v. Shields, 575 N. E. 2d 538 (Ill. 1991) 23

Planned Parenthood v. Casey, 120 L. Ed. 2d 674,
112 S. Ct. 2791 (1992) 19

Reed v. Ross, 468 U. S. 1, 82 L. Ed. 2d 1,
104 S. Ct. 2901 (1984) 19

Rose v. Clark, 478 U. S. 570, 92 L. Ed. 2d 460,
106 S. Ct. 3101 (1986) 10, 11

Saffle v. Parks, 494 U. S. 484, 108 L. Ed. 2d 415,
110 S. Ct. 1257 (1990) 5, 8, 12, 17, 18, 20

Sandstrom v. Montana, 442 U. S. 510, 61 L. Ed. 2d 39,
99 S. Ct. 2450 (1979) 9, 10

Sawyer v. Smith, 111 L. Ed. 2d 193,
110 S. Ct. 2822 (1990) 6, 7, 8, 16, 17, 18, 20, 27

Selvage v. Collins, 494 U. S. 108, 108 L. Ed. 2d 93,
110 S. Ct. 974 (1990) 19

Stringer v. Black, 117 L. Ed. 2d 367,
112 S. Ct. 1130 (1992) 17, 29

Teague v. Lane, 489 U. S. 288, 103 L. Ed. 2d 334,
109 S. Ct. 1060 (1989) ..... Passim

United States v. Title Ins. & Trust Co., 265 U. S. 472,
68 L. Ed. 1110, 44 S. Ct. 621 (1924) 13

Woodson v. North Carolina, 428 U. S. 280,
49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976) 8

Yates v. Aikens, 484 U. S. 211, 98 L. Ed. 2d 546,
108 S. Ct. 534 (1988) 17

Youngstown Sheet & Tube Co. v. Sawyer, 343 U. S. 579,
96 L. Ed. 1153, 72 S. Ct. 863 (1952) 21

Miscellaneous

Illinois Pattern Jury Instructions, Criminal
(2d ed. 1981) 2, 5, 22, 24

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JERRY D. GILMORE,

Petitioner,

vs.

KEVIN TAYLOR,

Respondent.

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

The present case involves the use of federal habeas corpus to retroactively apply a rule invalidating an established state practice. This use of retroactivity is enormously disruptive to state judicial systems and seriously undermines the finality of state convictions. This is contrary to the rights of victims and society which CJLF was formed to advance.

---

1. CJLF has received written consent from both parties to file this brief.

SUMMARY OF FACTS AND CASE

On September 14. 1985, Kevin Taylor stabbed to death his ex-wife's boyfriend, Scott Sinscalachi. On the day of the killing, Taylor had called his ex-wife Joyce to arrange plans for him to visit with their daughter Katie. Taylor made a subsequent call to change the plans, but Sinscalachi answered this time and refused to let Taylor talk to Joyce or visit Katie. Pet. App. 2-3.

After this, Taylor drove to Joyce's apartment, where he found Katie sitting on the floor while Joyce and Scott were sitting up in bed. A fight ensued and Taylor stabbed Scott, killing him. *Id*., at 3.

At trial, the jury was given Illinois' pattern instructions on murder and voluntary manslaughter. Illinois' pattern instructions were prepared by a committee of judges, professors, and attorneys appointed by the Illinois Supreme Court. See Illinois Pattern Jury Instructions, Criminal vii-ix (2d ed. 1981). It was "the long-standing practice" in Illinois murder cases to give the jury the pattern instructions on murder and voluntary manslaughter. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). They did not expressly tell the jury that it had to consider defendant's manslaughter evidence even if it found both elements of murder. Taylor was convicted of murder and received a 35-year sentence. Pet. App. at 4.

Taylor's direct appeal and state postconviction efforts were unsuccessful. See *id*., at 4-5. After his conviction became final, the Illinois Supreme Court found that the same pattern instructions that had been given in Taylor's case were erroneous. See *People* v. *Reddick*, 526 N. E. 2d 141 (Ill. 1988). In *Falconer* v. *Lane*, 905 F. 2d 1129, 1136 (CA7 1990), the Seventh Circuit held that *Reddick* had a constitutional dimension, and used this to overturn an Illinois murder conviction on federal habeas corpus. In the present case, the district court refused to apply *Falconer* to Taylor's conviction, finding that it was a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989). Pet.

App. 32. The Seventh Circuit reversed, finding *Falconer* was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). Pet. App. 21-22.

SUMMARY OF ARGUMENT

The Seventh Circuit improperly analyzed the newness question under *Teague*. The two authorities it cites to support its finding that the *Falconer* rule was not new are incapable of supporting this proposition. One authority is too late and both are too general to support the Seventh Circuit's *Teague* analysis.

The finality interests underlying *Teague* would best be served by a rule that any decision overturning an established state practice is *per se* "new" under *Teague*. This would serve the important interests of minimizing the disruptiveness of federal habeas corpus on state criminal justice systems. It would also provide a useful bright line that would make *Teague* more straightforward to apply, thus reducing the risk of erroneous applications of *Teague* like the one in the present case.

The established practice rule is consistent with *Teague*. A court presented with a challenge to an established statewide practice will at most be presented with a disagreement on the constitutionality of the practice. In this situation, upholding the practice constitutes a good faith interpretation of the Constitution. As the deterrent purpose of habeas corpus is thus unaffected by the established practice rule, the rule comports with *Teague*.

The present case demonstrates the need for this rule. The Illinois Supreme Court decided on its own to make the instructions more favorable for defendants. But it limited the impact of this decision by not allowing it to be applied retroactively on collateral attack. The decision of the Seventh Circuit to retroactively apply a rule derived

from the Illinois Supreme Court's decision thus punishes Illinois for its own good deed.

The decision in *Penry* v. *Lynaugh*, that a rule overturning the established practice of the Texas courts was not new, should not prevent adoption of the established practice rule. Much of *Penry* has been eroded by this Court's subsequent interpretations of *Teague*; what remains of *Penry* should be confined to the retroactivity of the rule in *Penry*.

ARGUMENT

I. The Seventh Circuit's *Teague* analysis is incorrect.

The present case demonstrates that the road to bad decisions can be paved with the best intentions. The court below attempted a cogent and reasoned application of *Teague* v. *Lane*, 489 U. S. 288 (1989). It gave a detailed, clear analysis of what should be taken into account when deciding whether a rule should be new under *Teague*. See Pet. App. 7-12.

Unfortunately, the Seventh Circuit did not follow its own advice. It held that the unconstitutionality of the Illinois murder and voluntary manslaughter instructions was not a new rule as it was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983). Pet. App. 21-23. Neither of these cases can negate a finding of newness under *Teague*. The inability of the court below to properly apply *Teague* demonstrates that this Court needs to clarify when a rule is new.

A. Boyde v. California.

1. Too new.

The rule the Seventh Circuit analyzed for newness was established in *Falconer* v. *Lane*, 905 F. 2d 1129 (CA7 1990). *Falconer* held that Illinois' pattern instructions on

murder and voluntary manslaughter, see Illinois Pattern Jury Instructions, Criminal 7.02, 7.04, 7.06 (2d ed. 1981), when read together, did not tell the jury that if it found the mitigating circumstances necessary for voluntary manslaughter it could not convict defendant of murder. *Falconer*, *supra*, 905 F. 2d, at 1136. According to the *Falconer* Court, this limit on defendant's manslaughter defense[2] violated the Due Process Clause.[3] *Ibid*.

In the present case, the Seventh Circuit found that *Falconer*'s holding that the jury misapplied the instructions was dictated by *Boyde* v. *California*, 494 U. S. 370 (1990). Pet. App. 21. This betrays a fundamental misunderstanding of *Teague* v. *Lane*, 489 U. S. 288 (1989). *Teague* recognized that the main purpose of the habeas writ is "ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted *at the time of the proceedings*." *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990) (emphasis added). Thus, *Teague* looks to whether "the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra*, 489 U. S., at 301 (emphasis in original). Therefore, a decision rendered after the conviction was final cannot support a finding that the rule is not new. See *Saffle*, *supra*, 494 U. S., at 494.

Taylor's conviction was final on June 4, 1987, when the Illinois Supreme Court denied his petition for appeal.[4]

---

2. Under Illinois law at the time, the mental element that mitigates murder to voluntary manslaughter acted as an affirmative defense. See *People* v. *Reddick*, 526 N. E. 2d 141, 145-146 (Ill. 1988). Manslaughter has since been abolished. *Ibid*.

3. *Amicus* also recognizes the weakness of the *Falconer* holding. *Falconer* found unconstitutional what is no more than an error of state law. See *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 708-709 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253.

4. Arguably, the date of finality was September 2, 1987, when the time to file a certiorari petition expired. It makes no difference in this case.

Pet. App. 5. *Boyde* was decided in 1990. Therefore, *Boyde* was not the law at the time Taylor's conviction was final, and thus cannot support the Seventh Circuit's holding.

2. Too general.

Even if the Seventh Circuit could use *Boyde* to protect its rule from *Teague* attack, *Boyde* would not prevent a newness finding. The court below understood that mere similarity between the rule in question and a Supreme Court precedent was not enough to allow retroactivity. Relatively general precedents leave greater room for ambiguous interpretation and thus are less likely to dictate a rule. Pet. App. 9. This is the correct way to analyze precedent under *Teague*. If the allowed generality is too high then a rule can always be "dictated" by some precedent, turning *Teague* into a useless formality. See *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207, 110 S. Ct. 2822, 2828 (1990).

The Seventh Circuit did not apply this principle. It found that the statements in *Cupp* v. *Naughten*, 414 U. S. 141, 146-147 (1973) that jury instructions must be viewed "as a whole" and in *Boyde* v. *California*, 494 U. S. 370, 380 (1990) that a reviewing court must ask "whether there is a reasonable likelihood that the jury has applied the challenged instruction" incorrectly were sufficiently specific to justify finding that *Falconer* was not a new rule. Pet. App. 21.

Allowing this level of generality would render *Teague* meaningless. The court below recognized that *Cupp* is too general to dictate *Falconer* within the meaning of *Teague*. Pet. App. 20. *Cupp*'s command to look at the entire instruction is relevant to a great many constitutional issues involving jury instructions. Therefore it is inapplicable to *Teague* analysis.

Boyde is no less general. The relevant part of *Boyde* dealt with whether California's death penalty instructions,

which listed eleven specific mitigating factors and a twelfth "catch-all" factor, satisfied defendant's Eighth Amendment right to have the jury "consider and give effect to all relevant mitigating evidence." 494 U. S., at 377. The *Boyde* Court noted that the standard for reviewing whether instructions unconstitutionally restricted the jury's consideration of evidence was unclear. *Id.*, at 378. In order to end the confusion, it developed the standard quoted by the Seventh Circuit. "We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.*, at 380.

The Seventh Circuit held that this dictated *Falconer*'s finding that the instructions were ambiguous and thus erroneously applied to preclude a voluntary manslaughter verdict. Pet. App. 21. The standard announced in *Boyde* does not dictate *Falconer*'s finding that the Illinois instructions were ambiguous. *Boyde* does supply a test for examining jury instructions, but this test does not dictate any particular result.

To say that the formulation of a test dictates a finding under that test is an invitation to abrogate *Teague*. This was recognized in *Sawyer* v. *Smith*, *supra*, where this Court rejected a contention similar to the one accepted by the Seventh Circuit. The *Sawyer* Court rejected petitioner's view that *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) was "dictated by the principle of reliability in capital sentencing." 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. *Caldwell* held that a death sentence is unconstitutional when the sentencer has been led to believe that others will be responsible for determining the appropriateness of the death sentence. 472 U. S., at 328-329. While the well-established principle that the capital sentencing process must be reliable was an important reason behind the *Caldwell* holding, see *id.*, at 329, it did not compel the result.

The *Sawyer* Court understood that while reliability was an important part of *Caldwell*, the previous cases dealing with reliability did not address the issue decided in *Caldwell*. *Sawyer, supra*, 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. The prior cases advancing the interest in reliability involved statutory schemes prohibiting the consideration of certain relevant mitigating evidence, *Lockett* v. *Ohio*, 438 U. S. 586 (1978) (plurality); *Eddings* v. *Oklahoma*, 455 U. S. 104 (1982); mandatory capital sentencing, *Woodson* v. *North Carolina*, 428 U S. 280 (1976); and a capital sentence based upon information defendant did not have notice of and could not respond to, *Gardner* v. *Florida*, 430 U. S. 349 (1977) (plurality). See *Sawyer, supra*, 111 L. Ed. 2d, at 207, 110 S. Ct., at 2828. Although these cases were strong influences on *Caldwell*, they did not dictate it because they dealt with different situations. " 'Even were we to agree with [petitioner's] assertion that our decisions in *Lockett* or *Eddings* inform, or even control or govern, the analysis of his claim, it does not follow that they compel the rule that [petitioner] seeks.' " *Ibid.* (quoting *Saffle* v. *Parks*, 494 U. S. 484, 490 (1990)).

The Seventh Circuit's application of *Boyde* is precisely what this Court sought to prevent in *Sawyer*. Application of the standard in *Boyde may* justify a finding that the jury instructions are ambiguous. But *Boyde* itself did not deal with the type of instruction given in the present case. Thus, like the precedent analyzed in *Sawyer*, even if *Boyde* might support the finding in *Falconer*, it did not dictate it.

B. Connecticut v. Johnson.

The Seventh Circuit's holding that *Connecticut* v. *Johnson*, 460 U. S. 73 (1983) dictates the result in *Falconer* is also insupportable. While its use of *Johnson* does not contain the obvious chronological error of its *Boyde* analysis, the Seventh Circuit's holding is nonetheless incorrect. It misinterprets *Johnson* to create an appearance of unanimity where none existed, in support of an argument that the *Johnson* decision never addressed.

The primary issue in the present case was whether *Falconer*'s holding, that the instructions deprived defendant of due process by preventing the jury from considering defendant's voluntary manslaughter evidence, was a new rule. The court below found that this holding was compelled by *Johnson*. It asserted that *Johnson* "considered jury instructions that created an erroneous presumption on the element of intent." Pet. App. 22. The Seventh Circuit found that the instruction in *Johnson*, like the one in *Sandstrom* v. *Montana*, 442 U. S. 510 (1979), had been found unacceptable because it "led the jury to ignore exculpatory evidence in finding defendant guilty of murder beyond a reasonable doubt." Pet. App. 22. Even though *Johnson* dealt with a presumption of intent and the present case involved an affirmative defense, the Seventh Circuit found *Johnson* close enough to compel *Falconer*'s holding. *Id.*, at 22-23. This holding is incorrect. *Johnson* dealt with a different, though related problem.

The first problem with *Johnson* is that it did not address the constitutionality of jury instructions. This Court granted certiorari in *Johnson* to determine whether a violation of *Sandstrom* can be harmless error. 460 U. S., at 75 (plurality). The constitutionality of the instructions was not in question. The *Johnson* plurality did note that conclusive presumptions on the issue of intent could lead juries to ignore evidence rebutting intent. See *id.*, at 85. The purpose behind this, however, was to support the plurality's conclusion that *Sandstrom* error was almost never harmless. The *Johnson* Court had to decide whether the prosecution could " 'prove[ ] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' " *Id.*, at 82 (quoting *Chapman* v. *California*, 386 U. S. 18, 24 (1967)). Applying the *Chapman* standard the plurality concluded:

> "An erroneous presumption on a disputed element of the crime renders irrelevant the evidence on the issue because the jury may have relied upon the presumption rather than upon that evidence. If the jury may have failed to consider evidence of intent, a reviewing court cannot hold that the error did not contribute to the verdict." 460 U. S., at 85-86 (plurality) (footnote omitted).

While *Sandstrom* error may preclude a jury from hearing defendant's evidence on intent, that is not the reason the error is unconstitutional. *Sandstrom* was meant to be an extension of the holding in *In re Winship*, 397 U. S. 358, 364 (1970) that the prosecution must prove every element of the charged crime beyond a reasonable doubt. See *Sandstrom*, *supra*, 442 U. S., at 521; *Francis* v. *Franklin*, 471 U. S. 307, 313 (1985); *Rose* v. *Clark*, 478 U. S. 570, 580 (1986). This cannot be reconciled with the Seventh Circuit's holding that the basis of *Sandstrom* and *Johnson* was the failure of the jury to consider exculpatory evidence. Pet. App. 22. By the Seventh Circuit's reasoning, if defendant presented no exculpatory evidence on intent, then the instruction in *Sandstrom* would not be erroneous because defendant was not deprived of any mitigating evidence. Yet a defendant who does not submit exculpatory evidence may still prevail if the prosecution does not satisfy the burden of proof. Thus *Sandstrom* error can exist even when defendant submits no evidence.[5]

Johnson is a plurality opinion. Recognizing this, the Seventh Circuit tried to paint a picture of unity. It asserted that the *Johnson* dissent did not contest the

---

5. A lack of mitigating evidence would make it more likely that any *Sandstrom* error was harmless. See *Rose*, *supra*, 478 U. S., at 583. But *Sandstrom* error is not harmless *per se* when defendant submits no evidence. If the prosecution's case is weak on intent, then *Sandstrom* error would still require reversal even if no exculpatory evidence was admitted. See *id.*, at 583-584.

purported holding of the plurality that the basis of *Sandstrom* was the exclusion of exculpatory evidence from the jury's consideration. Pet. App. 22, n. 7.

While the *Johnson* dissent did not directly attack the passage in *Johnson* that the Seventh Circuit relied upon, the evidentiary effect of *Sandstrom* error was hotly disputed.

> "Contrary to the plurality's assumption, a *Sandstrom*-type presumption does not operate independently of the evidence. The jury must look to the evidence initially to see if the basic facts have been proved before it can consider whether it is appropriate to apply the presumption." 460 U. S., at 96 (Powell, J., dissenting).

Justice Powell's dissent became the basis of the majority opinion in *Rose* v. *Clark* that effectively overruled the *Johnson* plurality. See *Rose*, *supra*, 478 U. S., at 580-581.

The Seventh Circuit attempts to use the passage from the *Johnson* plurality to compel a rule of law not before the *Johnson* Court. Its construction of the plurality opinion is directly contrary to this Court's decisions in the *Sandstrom* line of cases. The passage the Seventh Circuit used was contested by the dissenters, whose views ultimately prevailed on the main issue in *Johnson*.

If such weak authority can compel a decision for the purpose of *Teague*, then few rules can ever be new. While the *Johnson* plurality and *Falconer* both mentioned that jury instructions can prevent the jury from considering evidence, this does not mean that *Johnson* compelled *Falconer*. The precedential value of the passage relied on by the Seventh Circuit is so low that it is difficult to see it dictate anything, let alone *Falconer*. See *Teague*, *supra*, 489 U. S., at 301.

The inability of the panel below to apply *Teague* properly demonstrates a need to further clarify when a rule is new. While it may be "admittedly difficult to

determine when a case announces a new rule," *ibid.*, this difficulty should not prevent this Court from making *Teague* as clear to the federal courts as possible. In the next section, *amicus* will submit a bright line test for determining newness that advances the interests in habeas corpus and finality protected by *Teague* while lessening the risk of erroneous application by the federal courts. Hopefully, adoption of this standard will prevent future mishaps like the one in the present case.

II. A rule overturning an established state practice is *per se* new under *Teague*.

Teague v. *Lane*, 489 U. S. 288 (1989) is based upon the principle that the extraordinarily disruptive remedy of collateral attack on a final judgment should be strictly limited to those cases where its purpose is served. The purpose of habeas corpus is not served when the state courts have made a reasonable, good-faith interpretation under then-existing rules and when the judgment itself is not a fundamental miscarriage of justice.[6] See *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990).

When a state trial court is confronted with an established state practice that has not been voided by this Court or by the state appellate courts, the natural, good-faith thing to do is to continue the practice and uphold the conviction. Collateral attack on final convictions obtained under such practices invokes the interests of finality and comity which *Teague* protects.

The present case demonstrates that the federal habeas courts are willing to interfere with established state practices in spite of *Teague*. The one way to assure that finality interests are protected is to draw a bright line that decisions striking down established state practices are *per*

6. The latter point is addressed in more depth in our *amicus* brief in *Dixon* v. *Williams*, No. 92-111.

se new under *Teague*. Unless a practice has continued in defiance of this Court's precedents, it may only be overruled by a new rule.

A. Practical Benefits.

Protecting established state practices under *Teague* has two distinct advantages. First, it will help reduce the risk of federal courts disruptively overturning many final state convictions that relied upon an established practice. Second, it will provide a useful bright line for federal courts to follow, thus reducing the risk of erroneous applications of *Teague*, such as the one in the present case.

1. Preserving convictions.

A court's decisions do not exist in a vacuum. The law has a substantial impact on our affairs. Changes in the law can disrupt many lives. Therefore, this Court has consistently demonstrated a willingness to minimize the disruptiveness of its decisions. This is seen in the Court's *stare decisis* decisions. When people arrange their affairs in accordance with this Court's decisions, *stare decisis* may dictate preserving a decision to avoid disruption. See *United States* v. *Title Ins. & Trust Co.*, 265 U. S. 472, 486-487 (1924).

While *stare decisis* typically protects the reliance interests in property and contract cases, see *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991), the criminal justice system develops its own reliance interests. An established practice in criminal law or procedure is likely to have influenced many convictions, as it is likely to be used in case after case. Overturning an established practice on collateral attack could thus cause many convictions to be invalidated.

This Court has recognized that its decisions can be very disruptive to state criminal justice systems. Thus *Miranda* v. *Arizona*, 384 U. S. 436 (1966) and *Escobedo* v.

Illinois, 378 U. S. 478 (1964) were not applied retroactively in part because doing so "would seriously disrupt the administration of our criminal laws. It would require the retrial or release of numerous prisoners found guilty by trustworthy evidence in conformity with previously announced constitutional standards." *Johnson* v. *New Jersey*, 384 U. S. 719, 731 (1966). Similarly, in *Linkletter* v. *Walker*, 381 U. S. 618 (1965) an important reason why this Court chose not to apply *Mapp* v. *Ohio*, 367 U. S. 643 (1961) retroactively was to minimize the disruption of state justice systems. See 381 U. S., at 637.

The retroactivity doctrine of these cases has been abandoned, see *Griffith* v. *Kentucky*, 479 U. S. 314 (1987), but its lesson remains. If settled practices are preserved under *Teague*, then the disruptive effect of decisions can be minimized without resorting to the disapproved jurisprudence of *Linkletter* and *Johnson*. If, however, established practices can be overturned at will on habeas corpus, the federal courts can and will seriously disrupt the administration of state judicial systems.

2. *Bright line rule.*

Another advantage of adopting a rule of automatic newness for rules overturning established state practices is that it will provide federal courts with a useful bright line to aid their interpretation of *Teague*. Bright line rules are normally directed at police. See *Dunaway* v. *New York*, 442 U. S. 200, 213-214 (1979). However, such rules also have value in providing courts with clear guidance, see *Fare* v. *Michael C.*, 442 U. S. 707, 718 (1979), and the present case amply demonstrates that such guidance is needed.

This Court has enunciated bright line rules in the Fourth Amendment's search and seizure law and the Fifth Amendment's self-incrimination law to aid in applying these complicated and changing bodies of law. The bright line rule is a useful device in these fields because it

provides the members of the criminal justice system with a clear standard to adhere to and interpret. See, *e.g.*, *New York* v. *Belton*, 453 U. S. 454, 458 (1981); *Fare*, *supra*, 442 U. S., at 718.

Determining when a rule is new under *Teague* is not an easy question. *Teague*, *supra*, 489 U. S., at 301. As the present case demonstrates, some federal courts will need help in making that determination. See part I, *ante*, at 4-12.

A bright line rule should make the law more specific, without unnecessarily changing the underlying standard which the rule seeks to apply. The rule proposed by *amicus* will improve the application of *Teague*. The determination that a practice is established is substantially less difficult than the current newness finding required by *Teague*.[7] To determine whether a state practice is established will rarely take more than a straightforward examination of state law. If the practice has been sanctioned for some significant time by the state courts, then it is established. If the state judiciary refuses to invalidate a practice that has gone on for some time, this too will demonstrate establishment. This was one reason the Illinois Supreme Court concluded that the instructions invalidated by *Reddick* were an established practice. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990).

On the other hand, more traditional analysis of the relevant authority under *Teague* can be daunting. In the present case, the Seventh Circuit first engaged in an extensive analysis of how to best determine whether a rule is new. It first noted that any decision overruling a prior case of this Court created a new rule. Pet. App. 7; see *Butler* v. *McKellar*, 494 U. S. 407, 412 (1990). It then recognized that few cases were clear cut enough to fall into this category. For most cases it is "more an art than

---

7. In cases which do not involve an established practice, however, the present *Teague* analysis will still be necessary.

a science" to determine whether a case applies or departs from prior precedent. Pet. App. 7.

Next, the Seventh Circuit found two criteria in *Teague* for distinguishing new from old rules. First, it looked to whether lower federal and state courts disagreed with the proposed rule. *Id.*, at 8-9. Disagreement would be powerful evidence that the rule was "subject to debate among reasonable minds." *Id.*, at 8; see *Butler*, *supra*, 494 U. S., at 415.

Next, it looked to "the generality of the precedent underlying the decision at issue." Pet. App. 9. Heeding the warning against excessive generality in *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207, 110 S. Ct. 2822, 2828 (1990), the Seventh Circuit set out to examine the generality of the precedent underlying the rule. If a precedent is more general, then there is more "latent ambiguity inherent in that precedent" and thus it is less likely to dictate a subsequent decision. Pet. App. 9.

The Seventh Circuit paid particular attention to this last criterion. It demonstrated that this Court made a similar use of generality in *Butler*. *Id.*, at 9-10. Furthermore, the Court below engaged in an extensive analysis of hypothetical applications of the generality principle. *Id.*, at 10-12.

In spite of the rigor and energy the Seventh Circuit brought to *Teague*, it failed miserably when the time came to apply it. The precedents that it found dictated *Falconer* were incapable of supporting this conclusion. See part I, *ante*, at 4-12. If this panel can stumble so badly, then other federal courts will do so as well.

Part of the problem may be the idiosyncratic nature of this Court's *Teague* jurisprudence. Beyond a few general principles derived from *Teague*, it is difficult to discern any common thread running through this Court's *Teague* cases. Each case after *Teague* has concentrated on analyzing the authority in the area of the law the rule in question is derived from. Thus most of this Court's

Teague jurisprudence on the newness question is a detailed analysis of death penalty law. See *Penry* v. *Lynaugh*, 492 U. S. 302, 316-328 (1989); *Saffle* v. *Parks*, 494 U. S. 484, 489-494 (1990); *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 206-211, 110 S. Ct. 2822, 2827-2831 (1990); *Stringer* v. *Black*, 117 L. Ed. 2d 367, 377-383, 112 S. Ct. 1130, 1135-1140 (1992). It is difficult to find much guidance from the subtle interplay of this Court's specialized death penalty precedents for analyzing a due process claim such as the one in the present case.

Teague is thus like other parts of the law that need bright line rules. Bright line rules are most needed where the law is heavily fact bound, requiring much case-by-case analysis. See, *e.g.*, *Belton*, *supra*, 453 U. S., at 458-459. *Teague* analysis, by being heavily oriented to the precedents relevant to the particular rule in question, is precedent oriented and thus subject to rule-by-rule analysis. Therefore, this Court's *Teague* jurisprudence would be well served by a bright line rule that can be applied across a broad spectrum of cases.

The established practice rule is such a bright line. If the case involves an established state practice, the only thing left for a federal court to do is see if the practice is in defiance of a prior precedent of this Court. Cf. *Yates* v. *Aiken*, 484 U. S. 211, 215-217 (1988) (no new rule question where the rule is virtually identical to precedent in effect at the time of conviction). For those cases involving established state practices, *Teague* will become much more straightforward to apply. Yet, as the next section demonstrates, the newness finding will be no less accurate.

B. Comports with Teague.

Teague strikes a compromise between the competing considerations most influenced by habeas corpus. *Teague* seeks to preserve habeas corpus' role in deterring states from violating current constitutional rules while at the

same time preserving the finality of state convictions. See *Teague* v. *Lane*, 489 U. S. 288, 308-310 (1989). Adopting this rule will continue habeas corpus' traditional role of deterring unconstitutional conduct while at the same time enhancing the finality of convictions. Therefore, the established practice rule is consistent with *Teague*.

The question of newness is decided by examining the underlying purpose of habeas corpus. See *Butler* v. *McKellar*, 494 U. S. 407, 413-414 (1990) (quoting *Teague*). The primary purpose of habeas corpus "is ensuring that state courts conduct criminal proceedings in accordance with the Constitution as interpreted at the time of the proceedings." *Saffle* v. *Parks*, 494 U. S. 484, 488 (1990). Retroactive application of new rules cannot serve this purpose because it is impossible to deter a state court from violating a precedent that does not yet exist. See *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 206, 110 S. Ct. 2822, 2827 (1990).

Therefore, it is necessary to examine the newness question from the perspective of the state court confronted with defendant's claim. See *Saffle*, *supra*, 494 U. S., at 488. When a state court is confronted with a constitutional challenge to an established practice in use throughout the state, one of three possible conditions will exist. Either there will be a conflict of authority over the constitutionality of the practice; or there will be uniform authority upholding the practice; or the constitutionality of the practice will have been so universally accepted that no challenges exist. The first circumstance is governed by *Butler* v. *McKellar*. If authority is split over the propriety of the rule, then it will generally be "susceptible to debate among reasonable minds" and therefore new. *Butler*, *supra*, 494 U. S., at 415.

The second and third situations are even stronger cases for newness. If no authority can be found to challenge the established practice, then defendant's claim may even qualify as "novel" for the purpose of the

procedural default rule. See *Reed* v. *Ross*, 468 U. S. 1, 17, 19-20 (1984); *Engle* v. *Isaac*, 456 U. S. 107, 131-132 (1982). This is a far greater degree of "newness" than required by *Teague*.[8]

Another important aspect of the state court's decision to uphold the established practice is *stare decisis*. Just as people develop expectations in the continued existence of this Court's precedents, established state practices generate expectation interests. These interests are worth preserving and should be respected under *Teague*.

Overruling too many precedents will suspend the public's belief in the good faith of the judiciary. See *Planned Parenthood* v. *Casey*, 120 L. Ed. 2d 674, 708, 112 S. Ct. 2791, 2815 (1992). Thus few precedents are overruled. This is demonstrated by this Court's practices where no more than a handful of precedents are overturned each year. Cf. *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 737, 111 S. Ct. 2597, 2610 (1991) (30 constitutional precedents have been overruled in whole or in part by this Court over the last 20 terms).

In addition to the public sense of stability promoted by adhering to *stare decisis*, upholding established rules also has a more direct influence on stability. Abandoning an established practice can be very disruptive to a state's criminal justice system. See part II A 1, *ante*, at 13-14. Confronted with these imperatives, a state court should be allowed to administer its practices at its own pace.

Stare decisis "is merely the application to judicial precedents of a more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts." *Payne*, *supra*, 115 L. Ed. 2d, at 742, 111 S. Ct., at 2613-2614 (Scalia, J., concurring). "The explicit overruling of an earlier holding

---

8. The relationship between "newness" and "novelty" is examined in detail in the Brief *Amicus Curiae* of the Criminal Justice Legal Foundation in *Selvage* v. *Collins*, No. 87-6700, 494 U. S. 108 (1990).

no doubt creates a new rule . . . ." *Saffle*, *supra*, 494 U. S., at 488. As preserving established practice is synonymous with preserving precedent, a rule overturning an established practice must be new.

This does not mean that state courts will use the established practice rule as a tool to ossify their criminal law. "State courts are coequal parts of our national judicial system and give serious attention to their responsibilities for enforcing the commands of the Constitution." *Sawyer*, *supra*, 111 L. Ed. 2d, at 210, 110 S. Ct., at 2831. Indeed, on the instruction in question in the present case, the Illinois Supreme Court decided to depart from its established practice without any prodding from a federal court. See *People* v. *Reddick*, 526 N. E. 2d 141 (Ill. 1988). All the Seventh Circuit did was to make the departure from the established practice much more disruptive than the Illinois high court intended. See part III, *post*, at 22-26.

Nor will *amicus*' proposed standard insulate fundamental miscarriages of justice from correction. *Teague* recognizes that in certain instances, the interests of justices will require retroactive application of new rules on habeas corpus. Thus *Teague* allows an exception for "watershed rules of criminal procedure" that implicates the fundamental fairness and accuracy of the trial. See *Teague*, *supra*, 489 U. S., at 311. This exception will keep the established practice rule from protecting such injustices. The classic example of a rule that would satisfy the second *Teague* exception, *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), see *Saffle*, *supra*, 494 U. S., at 495, overturned an established state practice, see 372 U. S., at 337.

The threat of later reversal on federal habeas corpus is unlikely to deter the states from preserving established procedures. A state judiciary generally cannot be expected to devote resources to anticipating how the federal judiciary will rule on a constitutional issue. "[S]tate

courts cannot 'anticipate, and so comply with, this Court's due process requirements or ascertain any standards to which this Court will adhere in prescribing them.' " *Teague*, *supra*, 489 U. S., at 310 (quoting *Brown* v. *Allen*, 344 U. S. 443, 534 (1953) (Jackson, J., concurring in the result)). A state court will be even less willing to do so if it risks the certain disruption caused by overturning an established practice.

Teague preserves good faith interpretations of the Constitution by state courts. *Butler* v. *McKellar*, 494 U. S. 407, 414 (1990). A court that follows an established state practice that has not been directly contradicted by any binding precedent is acting in good faith. " '[T]raditional ways of conducting government . . . give meaning' to the Constitution . . . ." *Mistretta* v. *United States*, 488 U. S. 361, 401 (1989) (quoting *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U. S. 579, 610 (1952) (Frankfurter, J., concurring)). State government traditions, as embodied in established practices, warrant similar respect.

The retroactive overruling of an established state practice can do significant harm to the finality interest *Teague* seeks to protect. See *Teague*, *supra*, 489 U. S., at 309-310. By their nature, established practices are likely to be repeated throughout the system. Overturning such a practice is likely to implicate many convictions, leading to wholesale reversals of certain classes of convictions. For example, the instructions given in the present case were routinely given in Illinois murder prosecutions. See *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). The Seventh Circuit's retroactivity ruling thus calls into question hundreds of murder convictions in Illinois. *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 707 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253. This unwelcome surprise will significantly harm the finality and deterrent effect of Illinois' most important criminal law. See *Teague*, *supra*, 489 U. S., at 309. The established practice rule can prevent such

surprises while preserving the deterrent value of habeas corpus.

III. The present case demonstrates the need to further protect established state practices under *Teague*.

The saga of Illinois' jury instructions shows that no good deed goes unpunished. The Illinois Supreme Court established a committee to promulgate model jury instructions to be used to guide the courts throughout the state. Its goal was to provide the courts with "simple, concise, unslanted and non-partisan instructions." Illinois Pattern Jury Instructions, Criminal vii (2d ed. 1981).

Illinois' high court did not rest in its quest to improve its criminal justice system. In *People* v. *Reddick*, 526 N. E. 2d 141, 144-146 (Ill. 1988), it held that the pattern instructions on murder and voluntary manslaughter erroneously stated the state's burden of proof regarding voluntary manslaughter.

In *Falconer* v. *Lane*, 905 F. 2d 1129 (CA7 1990), the *Reddick* decision was brought to the attention of the Seventh Circuit. The *Falconer* court found a constitutional dimension to the *Reddick* decision and thus found that the use of the pattern instructions condemned in *Reddick* violated due process. *Id*., at 1134. The court did not address the issue of retroactivity because the state did not raise the issue. *Id*., at 1137.

After *Falconer*, but before the present case, the Illinois Supreme Court sorted out the retroactivity of *Reddick*. In *People* v. *Flowers*, 561 N. E. 2d 674 (Ill. 1990), the Illinois Supreme Court held that *Reddick* did not apply retroactively on collateral review. The *Flowers* court found that *Reddick* did have a constitutional dimension. *Id*., at 681. Adopting the rationale of *Teague*, the Illinois Supreme Court determined that *Reddick* constituted a new rule and did not satisfy either of the *Teague* exceptions for retroactivity. *Id*., at 682-684..

The *Flowers* court had two reasons to hold that *Reddick* was new. First, it found that *Reddick*'s "conclusion did not necessarily flow from the statutory analysis" of Illinois' homicide laws given this Court's decision in *Patterson* v. *New York*, 432 U. S. 197 (1977). 561 N. E. 2d, at 683. The second reason that *Reddick* was new was that it upset an established practice.

> "Also, this 'result was not *dictated* by precedent existing at the time.' (Emphasis in original.) (*Teague*, 489 U. S. at 301, 109 S. Ct. at 1070, 103 L. Ed. 2d at 349.) Instead, the long-standing practice in the trial courts was to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions." *Ibid*.

In *People* v. *Shields*, 575 N. E. 2d 538, 542-543 (Ill. 1991), Illinois completed the retroactivity puzzle, finding that *Reddick* was fully retroactive on direct review as it was a constitutional decision. See *Griffith* v. *Kentucky*, 479 U. S. 314, 328 (1987). Illinois' decision to preserve most of its murder convictions while "treating similarly situated defendants the same," *id*., at 323, was overturned by the Seventh Circuit's decision in the present case to apply *Falconer* retroactively.

The court below paid no attention to the careful distinction the Illinois Supreme Court made between direct and collateral review. After the Seventh Circuit's decision that *Falconer* was not new, *Flowers* would not stop Illinois prisoners from collaterally attacking their murder convictions. Although they would be thwarted in state court, the Seventh Circuit would freely grant habeas where the pattern instructions were used, regardless of when the conviction was final.

The Illinois Supreme Court in *Reddick* decided on its own to re-examine the jury instructions it helped promulgate, finding them impermissibly prejudicial to the defendant. It then chose to vacate them, requiring courts to come up with instructions more favorable to defen-

dants.[9] It had not been told to re-examine its jury instructions by this Court or any other court.

Reddick in turn supplied the inspiration for *Falconer*. The *Falconer* court essentially adopted *Reddick* and added a constitutional patina. See 905 F. 2d, at 1136. In the present case, the Seventh Circuit simply determined whether to apply *Falconer* retroactively. See Pet. App. 2.

It is impossible to say that the Seventh Circuit never would have reached the *Falconer* holding had *Reddick* not been decided. Someone would have made a similar claim to the Seventh Circuit, and it could have reached the result of *Falconer* without the help of *Reddick*. But *Reddick* certainly gave the Seventh Circuit the inspiration that ultimately threatens many murder convictions. This inspiration made the Seventh Circuit's decision much easier. The security of favorable precedent is tempting. Once Illinois decided to question its murder instructions, the necessary leap for the Seventh Circuit to intrude upon this established practice became much smaller.

Reddick is now like an experiment that has blown up in the Illinois court's face. In *Reddick*, it decided to change a part of the criminal justice system to benefit defendants. In *Flowers* and *Shields*, it attempted to control the impact of the *Reddick* experiment, thus limiting the disruption caused by *Reddick*. The intervention of the Seventh Circuit turned the experiment into a failure by giving *Reddick* a much greater impact than the Illinois Supreme Court intended. Thus, Illinois is punished for its own good deeds.

The Illinois Supreme Court never explicitly stated in *Flowers* that it was acting to limit the impact of *Reddick*. Yet this was the effect of the *Flowers* decision and the likely reason for it. An important component of *Teague*

---

9. The pattern instructions were modified to conform with *Reddick*. See Illinois Pattern Jury Instructions, Criminal 7.02B, 7.02C (2d ed. 1989 Supp.).

was preserving the state's interest in the finality of its convictions.

> "Application of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect." *Teague*, *supra*, 489 U. S., at 309.

Avoiding disruption is an important component of the finality interest. Applying new rules on collateral attack is particularly costly because "it *continually* forces the states to marshall resources in order to keep in prison defendants whose trials and appeals conformed to then existing constitutional standards." *Id.*, at 310 (emphasis in original). This cost is magnified if the new rule requires reversal of many state convictions, as many cases are brought up on habeas corpus and subsequently retried after habeas is granted.

"The essence of federalism is that states must be free to develop a variety of solutions and not forced into a common uniform mold." *Addington* v. *Texas*, 441 U. S. 418, 4311 (1979). The actions of the Illinois Supreme Court demolish the discredited nostrum that state courts are unwilling to protect criminal defendants under the Constitution. See *Butler* v. *McKellar*, 494 U. S. 407, 430, n. 12 (1990) (Brennan, J., dissenting). Yet it was penalized for its aggressive protection of defendants.

"The Supreme Court of Illinois decided to improve the mesh between murder and manslaughter, thinking that prospective application meant bearable costs . . . . From now on, prudence lies in perpetuating dubious instructions rather than improving them." See *Flowers* v. *Illinois Dept. of Corrections*, 962 F. 2d 703, 711 (CA7 1992) (Easterbrook, J., concurring), cert. pending, No. 92-253. If a state court runs the risk of having its criminal justice system significantly disrupted on federal habeas corpus, it will be much less willing to modify or abandon an estab-

lished practice. The present case will demonstrate that the state court cannot assure itself that it can control the impact of its own decision; it will have to hope that the federal circuit in which it resides does not repeat the *Falconer* process of adoption and retroactive application. Adopting the established practice standard for *Teague* will free states from this threat.

IV. The established practice test should not be prevented by *Penry* v. *Lynaugh*.

In *Penry* v. *Lynaugh*, 492 U. S. 302, 328 (1989), this Court found that a Texas death penalty trial violated the Eighth Amendment because the jury had not been instructed that it could fully consider defendant's mitigating evidence. The *Penry* jury had been instructed in accordance with Texas' death penalty statute, which required the jury answer three special issues. If it unanimously answered yes to all three, then the trial court must impose the death sentence. *Id.*, at 310. In *Jurek* v. *Texas*, 428 U. S. 262 (1976), this Court found this same statutory system was constitutional. See *id.*, at 273-274 (plurality); *id.*, at 278-279 (White, J., concurring). The *Penry* Court found that its holding did not announce a new rule under *Teague* v. *Lane*, 489 U. S. 288 (1989). 492 U. S., at 319. This decision should not preclude established state practices from being protected by *Teague*.

Amicus recognizes that its proposed rule is inconsistent with the *Penry* decision. Texas had continued the practice of giving the statutory instructions first approved in *Jurek*. See *id.*, at 354 (Scalia, J., dissenting). Twelve years later, a narrow majority of this Court then determined that this practice was unconstitutional, sweeping away this established practice, while holding that the rule announced was not new. *Id.*, at 328.

In *Franklin* v. *Lynaugh*, 487 U. S. 164 (1988), a plurality found that *Jurek* had unconditionally approved

the manner in which mitigating evidence is considered under the Texas statute. Footnote 10 of the *Franklin* opinion flatly rejects the precise argument later accepted in *Penry*. 487 U. S., at 180. The *Penry* Court dismissed this opinion, finding that five members of the concurrences and dissents in *Franklin* found that *Jurek* had not precluded a claim like the one made in *Penry*. *Penry*, *supra*, 492 U. S., at 320-321.

The force of the *Penry* decision, however, has been eroded by subsequent interpretations of *Teague*. In *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990), this Court recognized that the fact that a decision is " 'controlled' or 'governed' " by prior precedent does not prevent it from being new. Thus, if the outcome "was susceptible to debate among reasonable minds," the proposed rule must be new. *Id.*, at 415.

The *Penry* majority's approach is not consistent with *Butler*'s reliance on the disagreement of reasonable minds. If this Court is sharply divided over the propriety of the proposed rule, then under *Butler* it must be new. This point was driven home in *Sawyer* v. *Smith*, 111 L. Ed. 2d 193, 207-208, 110 S. Ct. 2822, 2828 (1990) where the dissent of three Justices in *Caldwell* v. *Mississippi*, 472 U. S. 320 (1985) demonstrated that *Caldwell* announced a new rule. Thus, under the reasoning of *Butler* and *Sawyer*, *Penry* should have been decided differently given the disagreement in *Franklin*. This at least calls into question much of the reasoning of the *Teague* part of *Penry*.

Yet the adoption of a different approach to *Teague* "newness" analysis does not require overruling the specific holding of *Penry*. That issue has been decided, and there is no need to re-examine it. In *Teague* itself, for example, this Court refused to re-examine the holding of *Allen* v. *Hardy*, 478 U. S. 255, 258 (1986) (*per curiam*) that *Batson* v. *Kentucky*, 476 U. S. 79 (1986) did not apply retroactively. *Teague*, *supra*, 489 U. S., at 295-296. The *Allen*

holding was made under the retroactivity standard of *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and its progeny. See *Allen*, 478 U. S., at 258. Although the *Teague* Court overruled the *Linkletter* standard, it chose to leave *Allen* undisturbed.

As in *Teague*, it is not necessary to re-examine a prior retroactivity decision. While *Penry* is good law for the retroactivity of its own rule, there is no need to apply its "newness" approach to future cases. Instead, this Court should rely on *Teague* and the decisions made after *Penry* to set forth a rule that will make *Teague* a consistent, uniformly applied doctrine.

V. The rule imposed by the Seventh Circuit is new.

Falconer and the present case struck down the Illinois Pattern Jury Instructions on murder and voluntary manslaughter. See *Falconer* v. *Lane*, 905 F. 2d 1129, 1133 (CA7 1990); Pet. App. 1-2. It was the standard practice in Illinois "to instruct the jury on murder and voluntary manslaughter consistent with the Illinois Pattern Jury Instructions." *People* v. *Flowers*, 561 N. E. 2d 674, 683 (Ill. 1990). Therefore, applying the established practice test, the rule in *Falconer* finding these instructions unconstitutional is new under *Teague* v. *Lane*, 489 U. S. 288 (1989).

The same result would be reached without the test. The decisions cited by the Seventh Circuit to hold that *Falconer* was not new, *Boyde* v. *California*, 494 U. S. 370 (1990) and *Connecticut* v. *Johnson*, 460 U. S. 73 (1983), are incapable of supporting the Seventh Circuit's conclusion. See part I, *ante*, at 4-12. The Seventh Circuit did not, however, cite the best supporting holding. *Beck* v. *Alabama*, 447 U. S. 625 (1980), while better for Taylor than the minimal authority cited by the Seventh Circuit, nonetheless does not dictate *Falconer*.

Beck held that a capital defendant could not be precluded from having the jury consider whether he was guilty of a lesser included offense. *Id.*, at 627. This arguably supports the notion that Illinois' instructions deprived defendant of having the jury give effect to his voluntary manslaughter claim. Yet the *Beck* Court limited its holding to capital cases, leaving open the question of whether there was a federal constitutional right to lesser included offense instructions in noncapital cases. *Id.*, at 638, n. 14. While this may "put a reasonable jurist on notice," that there may be a general right to lesser included offense instructions, see *Stringer* v. *Black*, 117 L. Ed. 2d 367, 388, 112 S. Ct. 1130, 1144 (1992) (Souter, J., dissenting), by no means does it dictate *Falconer*.

The *Beck* Court relied heavily upon this Court's capital punishment jurisprudence. See 447 U. S., at 637-640. The fact that it was a capital case was essential to the decision. See *id.*, at 637. There is a significant leap from this Court's capital jurisprudence to the rest of constitutional criminal procedure. Given *Beck*'s reliance on this very specialized part of the criminal law, it was at least "subject to debate among reasonable minds" as to whether *Beck* applied to noncapital cases. See *Butler* v. *McKellar*, 494 U. S. 407, 415 (1990).

At the very least, the *Falconer* rule "was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague* v. *Lane*, 489 U. S. 288, 301 (1989) (emphasis in original). This is the same conclusion that would be reached by the straightforward application of the proposed established practice rule. The only difference is that it is more difficult for a court to misapply the established practice rule as badly as the Seventh Circuit misapplied *Teague* in the present case.

CONCLUSION

The decision of the Court of Appeals for the Seventh Circuit should be reversed.

November, 1992

Respectfully submitted,

CHARLES L. HOBSON

Attorney for Amicus Curiae
Criminal Justice Legal Foundation